

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 11 2008

DEREK ANDREW INC,

Plaintiff - Appellee,

v.

POOF APPAREL CORPORATION,

Defendant - Appellant.

No. 07-35048

D.C. No. CV-05-01136-JPD

MEMORANDUM*

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the Western District of Washington
James P. Donohue, Magistrate Judge, Presiding

Argued and Submitted May 8, 2008
Seattle, Washington

Before: GRABER and RAWLINSON, Circuit Judges, and WRIGHT,** District
Judge.

Defendant Poof Apparel Corporation appeals the district court's order
denying its motion to set aside entry of default and the court's award to Plaintiff
Derek Andrew, Inc., of \$685,307.70 in disgorged profits under the Lanham Act

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Otis D. Wright II, United States District Judge for the
Central District of California, sitting by designation.

and Washington Consumer Protection Act. The relevant facts are set forth in an opinion filed this date.

1. We review for abuse of discretion the district court's denial of a motion to set aside an entry of default under Federal Rule of Civil Procedure 55(c). Yusov v. Yusuf, 892 F.2d 784, 787 (9th Cir. 1989). We find no abuse of discretion here, because Defendant's "culpable conduct led to the default." See Am. Ass'n Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1108 (9th Cir. 2000) (listing factors allowing court to deny motion to vacate default judgment). Defendant received actual notice of the filing of the action and intentionally failed to answer. Its belief that this was a small case more appropriate for settlement than litigation was insufficient justification for its failure to respond to the complaint. See Franchise Holding II, LLC v. Huntington Rests. Group, Inc., 375 F.3d 922, 926 (9th Cir. 2004) (rejecting similar argument).

2. We review for clear error the district court's computation of damages. Lum v. Honolulu, 963 F.2d 1167, 1170 (9th Cir. 1992), and find none. Under 15 U.S.C. § 1117(a), the remedies available to a prevailing plaintiff include an award of the defendant's profits. Title 15 U.S.C. § 1117(a) also provides that, in assessing profits, the plaintiff need only prove the defendant's sales, and the "defendant must prove all elements of cost or deduction claimed." The district

court permissibly found that Mr. Terzi's testimony was neither credible nor based on personal knowledge, permissibly relied on Plaintiff's evidence, including documentary evidence, and permissibly drew reasonable inferences.

The district court's denial of the motion to set aside the default judgment, and its calculation of damages under the Lanham Act and the parallel Washington Consumer Protection Act are AFFIRMED.